PP v. GAN BOON AUN

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: W-09-258-11-2011]
5 OCTOBER 2015

CONSTITUTIONAL LAW: *Legislature – Constitutionality of – Declaration of unconstitutionality of written law – Whether s. 122(1) of Securities Industry Act 1983 ('SIA') in violation of art. 5(1) of Federal Constitution ('Constitution') – Whether s. 122(1) denied respondent right to be presumed innocent until proven guilty – Whether art. 5 of Constitution allows for deprivation of fundamental liberty if law so provides – Only two accused persons charged for offence and not other directors of company – Whether art. 122(1) contravened art. 8(1) of Constitution – Whether discretion to charge vests in Attorney General according to art. 145(3) of Constitution – Whether s. 122(1) violated doctrine of separation of powers – Whether calling of accused person to enter defence on alternative charge in breach of rule against double jeopardy – Principal charge and alternative charge not same offence as ingredients differed – Whether High Court Judge erred in declaring s. 122(1) unconstitutional*

CONSTITUTIONAL LAW: *Fundamental liberties – Breach of – Constitutionality of provision – Alternative charge – Securities Industry Act 1983, ss. 122(1), 122B(a)(bb) – False statement to stock exchange – Whether calling of respondent to enter defence on alternative charge in breach of rule against double jeopardy – Principal charge and alternative charge not same offence as ingredients differed – Whether s.122(1) void for breaching arts. 5(1) and 8(1) of Federal Constitution – Whether s. 122(1) denied respondent right to be presumed innocent until proven guilty – Whether decision to charge vests in Attorney General according to art. 145(3) of Federal Constitution – Whether s. 122(1) violated doctrine of separation of powers – Whether High Court Judge erred in declaring s. 122(1) unconstitutional*

This was an appeal by the Public Prosecutor against the decision of the High Court in declaring s. 122(1) of the Securities Industry Act 1983 ('SIA') to be unconstitutional. The respondent, together with one Khiudin, were charged in the Sessions Court for a principal charge of making a misleading statement in a material particular in Transmile Group Berhad's report, thereby committing an offence under s. 86(b) read together with s. 122(c) of the SIA and an alternative charge that Transmile Group Berhad had committed an offence when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's report and that the respondent and Khiudin, as directors of Transmile Group Berhad, were deemed to have committed an offence under s. 122B(a)(bb) read

A together with s. 122(1) of the SIA. The Sessions Court Judge acquitted and discharged the respondent and Khiudin on the principal charge but ordered them to enter their defence on the alternative charge. Before the commencement of the defence case, the respondent and Khiudin filed an application for a referral of a constitutional question to the High Court under
B s. 30 of the Courts of Judicature Act 1964 which was whether s. 122(1) of the SIA violated arts. 5(1) and 8(1) of the Federal Constitution. The High Court answered the question in the affirmative and found that the right of an accused person to be presumed innocent until proven guilty and the right of an accused person to have a charge proven against him beyond reasonable
C doubt were fundamental rights enshrined in art. 5(1) of the Federal Constitution. The High Court Judge also found that the deeming provision in s. 122(1) of the SIA strikes at the heart of art. 8(1) of the Federal Constitution for the reason that the Public Prosecutor had discriminated against the respondent and Khiudin by charging them but not the other directors of the company. Dissatisfied, the Public Prosecutor appealed to this
D court. The issues that arose were (i) whether s. 122(1) was in violation of art. 5(1) as it had taken away the presumption of innocence of an accused person; (ii) whether s. 122(1) was in violation of art. 8(1) as only the two accused persons were charged although there were other directors for Transmile Group Berhad; (iii) whether s. 122(1) violated the doctrine of
E separation of powers; and (iv) whether the calling of the respondent and Khiudin to enter defence on the alternative charge was in breach of the rule against double jeopardy.

Held (allowing appeal; setting aside orders of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court):

F

(1) Even if one were to accept that the presumption of innocence until proven guilty is a fundamental liberty enshrined under art. 5, art. 5 itself allows for the deprivation of that fundamental liberty if the law so provides and in the instant appeal, s. 122(1) is the law depriving the
G respondent of the presumption of innocence. The respondent may be absolved of liability under s. 122(1) if he could show that the offence was committed by the company without his consent or connivance and that he had exercised all such diligence to prevent the commission of the offence as he ought to have exercised. Thus, s. 122(1), which was concerned with the rule of evidence where it shifts the burden on the
H respondent under s. 106 of the Evidence Act 1950 to show that the offence was committed by the company without the respondent's consent or connivance, had not transgressed art. 5. The respondent's consent or connivance or whether he had exercised such diligence to prevent the commission of the offence by the company was within his
I own knowledge. (paras 19, 25 & 26)

(2) Article 145(3) of the Federal Constitution provides that the discretion to charge vests in the Attorney General who has the power to institute, conduct or discontinue any proceedings for an offence. 'Discretion' means liberty of deciding as one thinks fit. Article 8 of the Federal Constitution must be read subject to art. 145(3) (*Johnson Tan Han Seng v PP*). Thus, the charge under s. 122(1) against the respondent and Khiudin, but not the other directors, did not violate art. 8 of the Federal Constitution. Section 122(1) of the SIA does not contravene art. 8 of the Federal Constitution in any way. (paras 27 & 31)

(3) This court was bound by the Federal Court decision in *PP v. Kok Wah Kuan* where it was held that the Federal Constitution does not have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. A provision of the Constitution could not be struck out on the ground that it contravened the doctrine. Similarly, no provision in the law may be struck out as unconstitutional as it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. Thus, the issue of violation of the doctrine of separation of powers could not be sustained. (paras 33 & 35)

(4) The respondent and Khiudin had not been acquitted or convicted of the alternative charge, hence it could not be said that they were tried again for the alternative charge. The principal charge and the alternative charge were not the same offence as the ingredients were different. In particular, while s. 86 relates to making a statement which induces the purchases of securities of Transmile Group Berhad by other persons, no such ingredient is present in s. 122B(a)(bb). Section 122B(a)(bb) relates to furnishing a misleading statement to the stock exchange. The ingredient for the offence under the two sections was clearly distinct. The dates for the principal charge and the alternative charge were also different. Thus, the High Court judge had erred in making the declaration that s. 122(1) of the SIA was unconstitutional. (para 40)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh Pendakwa Raya terhadap keputusan Mahkamah Tinggi dalam mengisytiharkan s. 122(1) Akta Perindustrian Sekuriti 1983 ('APS') sebagai tidak berperlembagaan. Responden, bersama-sama seorang lagi yang bernama Khiudin, telah didakwa di Mahkamah Sesyen bagi pertuduhan utama membuat kenyataan secara material palsu dalam laporan Transmile Group Berhad, dengan itu melakukan kesalahan di bawah s. 86(b) dibaca bersama-sama s. 122(c) APS dan pertuduhan alternatif bahawa Transmile Group Berhad telah melakukan kesalahan apabila ia, dengan niat untuk memperdaya, membekalkan kenyataan palsu kepada Bursa Malaysia Securities Berhad dalam laporan Transmile Group Berhad dan bahawa responden dan Khiudin sebagai pengarah Transmile Group Berhad telah

dikatakan melakukan satu kesalahan di bawah s. 122B(a)(bb) dibaca bersama-sama s. 122(1) APS. Hakim Mahkamah Sesyen melepaskan dan membebaskan responden dan Khiuddin untuk pertuduhan utama tetapi memerintahkan mereka membela diri atas pertuduhan alternatif. Sebelum permulaan kes pembelaan, responden dan Khiuddin memfailkan permohonan untuk merujuk satu persoalan berbentuk perlembagaan kepada Mahkamah Tinggi di bawah s. 30 Akta Mahkamah Kehakiman 1964 iaitu sama ada s. 122(1) APS melanggar per. 5(1) dan 8(1) Perlembagaan Persekutuan. Mahkamah Tinggi menjawab persoalan ini secara afirmatif dan mendapati bahawa hak tertuduh untuk dianggap tidak bersalah hingga dibuktikan salah dan hak tertuduh untuk mempunyai pertuduhan dibuktikan terhadapnya melampaui keraguan munasabah adalah hak-hak asasi yang termaktub dalam per. 5(1) Perlembagaan Persekutuan. Hakim Mahkamah Tinggi juga mendapati peruntukan dalam s. 122(1) APS selaras dengan per. 8(1) Perlembagaan Persekutuan atas alasan bahawa Pendakwa Raya telah mendiskriminasi responden dan Khiudin dengan mendakwa mereka tetapi tidak pengarah-pengarah lain syarikat. Tidak berpuas hati, Pendakwa Raya merayu kepada mahkamah ini. Isu-isu yang dibangkitkan adalah: (i) sama ada s. 122(1) melanggar per. 5(1) kerana menyingkirkan anggapan ketakbersalahan tertuduh; (ii) sama ada s. 122(1) melanggar per. 8(1) kerana hanya kedua-dua tertuduh didakwa walaupun terdapat pengarah-pengarah lain di Transmile Group Berhad; (iii) sama ada s. 122(1) melanggar doktrin perasingan kuasa; dan (iv) sama ada pemanggilan responden dan Khiudin untuk memasukkan pembelaan terhadap pertuduhan alternatif melanggar peraturan pendakwaan dua kali.

Diputuskan (membenarkan rayuan; mengetepikan perintah-perintah Mahkamah Tinggi)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Sekalipun diterima bahawa anggapan ketakbersalahan sehingga dibuktikan salah adalah kebebasan asasi yang termaktub di bawah per. 5, per. 5 sendiri membenarkan pelucutan kebebasan asasi itu jika undang-undang memperuntukkan sedemikian dan dalam rayuan, s. 122(1) adalah undang-undang yang menafikan anggapan ketakbersalahan responden. Responden boleh dibebaskan daripada liabiliti di bawah s. 122(1) jika dia berjaya membuktikan bahawa kesalahan itu telah dilakukan oleh syarikat tersebut tanpa persetujuan atau kerjasamanya dan bahawa dia telah menjalankan segala usaha untuk mencegah pelakuan kesalahan sebagaimana yang patut dilaksanakan. Oleh itu, s. 122(1) yang berkaitan dengan peraturan keterangan di mana ia memindahkan beban ke atas responden di bawah s. 106 Akta Keterangan 1950 untuk menunjukkan bahawa kesalahan itu telah dilakukan oleh syarikat tersebut tanpa persetujuan atau kerjasama responden, tidak

melanggar per. 5. Persetujuan atau kerjasama responden atau sama ada dia telah menjalankan segala usaha untuk mencegah pelakuan kesalahan itu oleh syarikat adalah dalam pengetahuannya sendiri.

(2) Perkara 145(3) Perlembagaan Persekutuan memperuntukkan bahawa budi bicara mendakwa terletak pada Peguam Negara yang mempunyai kuasa untuk memulakan, menjalankan atau memberhentikan apa-apa prosiding kesalahan. 'Budi bicara' bererti kebebasan membuat keputusan seperti mana yang difikirkan. Perkara 8 Perlembagaan Persekutuan mesti dibaca tertakluk kepada per. 145(3) (*Johnson Tan Han Seng v. PP*). Oleh itu, pertuduhan di bawah s. 122(1) terhadap responden dan Khiudin, tetapi bukan terhadap pengarah-pengarah lain, tidak melanggar per. 8 Perlembagaan Persekutuan. Seksyen 122(1) APS dalam apa-apa cara tidak melanggar per. 8 Perlembagaan Persekutuan.

(3) Mahkamah ini terikat dengan keputusan Mahkamah Persekutuan dalam *PP v. Kok Wah Kuan* yang memutuskan bahawa Perlembagaan Persekutuan tidak mempunyai ciri-ciri perasingan kuasa dan pada masa yang sama ia mengandungi ciri-ciri yang tidak mematuhi doktrin secara ketat. Peruntukan dalam Perlembagaan tidak boleh dibatalkan atas alasan bahawa ia bertentangan dengan doktrin. Begitu juga, tiada peruntukan dalam undang-undang yang boleh dibatalkan kerana tidak berperlembagaan kerana ia tidak tidak selaras dengan Perlembagaan walaupun ia mungkin selaras dengan doktrin. Oleh itu, isu pelanggaran doktrin perasingan kuasa tidak boleh dikekalkan.

(4) Responden dan Khiudin belum dibebaskan atau disabitkan dengan pertuduhan alternatif, dengan itu ia tidak dapat dikatakan bahawa mereka akan dibicarakan semula bagi pertuduhan alternatif. Pertuduhan utama dan pertuduhan alternatif bukan kesalahan yang sama kerana butir-butirnya berbeza. Khususnya, s. 86 berkaitan dengan membuat kenyataan yang mendorong pembelian sekuriti Transmile Group Berhad oleh orang lain manakala butir-butir ini tidak wujud dalam s. 122B(a)(bb). Seksyen 122B(a)(bb) berkaitan dengan pembekalan kenyataan yang palsu kepada bursa saham. Butir-butir kesalahan di bawah kedua-dua seksyen jelas berbeza. Tarikh pertuduhan utama dan pertuduhan alternatif juga berbeza. Oleh itu, Hakim Mahkamah Tinggi terkhilaf dalam membuat deklarasi bahawa s. 122(1) APS tidak berperlembagaan.

Case(s) referred to:

Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Jamali Adnan v. PP [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 SC ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

Kok Wah Kuan v. PP [2007] 4 CLJ 454 CA ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

A *Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC* ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(foll)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
B *Saminathan & Ors v. PP [1955] 1 LNS 138 HC* ***(refd)***

Legislation referred to:
Child Act 2001, s. 97(2)
Courts of Judicature Act 1964, s. 30
Evidence Act 1950, s. 106
C Federal Constitution, arts. 5(1), 7(2), 8(1)
Securities Industry Act 1983, ss. 86, 122(1), 122B(a), (bb)

For the appellant - Manoj Kurup (Shanti Geoffrey, Mohd Hafiz Mohd Yusoff & Munira Masood with him); DPP's
For the respondent - Tan Hock Chuan (Kumaraendran, Cheah Sin Chin, Cains Tan & Lee Wenxu with him); M/s Tan Hock Chuan & Co
D

Reported by Suhainah Wahiduddin

JUDGMENT

E **Tengku Maimun Tuan Mat JCA:**

[1] This is an appeal by the public prosecutor against the decision of the High Court at Kuala Lumpur in declaring s. 122(1) of the Securities Industry Act 1983 (the SIA) to be unconstitutional.

F **Background Facts**

[2] The respondent together with one Khiudin bin Mohd were charged in the Sessions Court at Kuala Lumpur for a principal charge and an alternative charge. The principal charge reads:

> That you between 28 February 2006 to 15 February 2007, at Bursa
G Malaysia Securities Berhad, Exchange Square, Bukit Kewangan 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur abetted Transmile Group Berhad (Company No. 373741-W) in making a statement that is misleading in a material particular in Transmile Group Berhad's "Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006" and the misleading statement
H is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement is misleading in a material particular, and you have committed an offence under s 86(b) read together with s. 122(c) of the Securities Industry Act 1983 (Act 280) and punishable under s 88B of the same Act.
I

While the alternative charge reads:

> That Transmile Group Berhad (Company No. 373741-W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, has committed an offence under s. 122B(a)(bb) of the Securities Industry Act 1983 (Act 280) when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's "Quarterly Report on Unaudited Consolidated Results for the Financial Year Ended 31 December 2006" and the misleading statement is underlined in red in the Appendix to this Charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under s. 122B(a)(bb) read together with s 122(1) of the Securities Industry Act 1983, and punishable under s 122B of the same Act.

[3] For ease of reference, we set out below ss. 86, 122(1) and 122B of the SIA:

> **False or misleading statements, etc.**
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> 86. Subject to section 87B, a person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilising the market prices of securities if, when he makes the statement or disseminate the information:
>
> (a) he does not care whether the statement or information is true or false; or
>
> (b) he knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.
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> **Offences by bodies of persons and by employees and agents.**
>
> 122. (1) Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, he is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.
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> **False reports to Commission, stock exchange or recognized clearing house.**
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> 122B. A person who:
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> (a) with intent to deceive, makes or furnishes; or
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> (b) knowingly authorises or permits the making or furnishing of,

A any false or misleading statement or report to the Commission, a stock exchange or a recognized clearing house relating to:

(aa) dealings in securities;

(bb) the affairs of a listed corporation;

B (cc) any matter or thing required by the Commission for the due administration of this Act; or

(dd) the enforcement of the rules of a stock exchange or the rules of a recognized clearing house,

commits an offence and is liable on conviction to a fine not exceeding C three million ringgit or to imprisonment for a term not exceeding 10 years or both.

[4] At the end of the prosecution's case, the Sessions Court judge acquitted and discharged the respondent and Khiudin on the principal charge but ordered them to enter their defence on the alternative charge.

D

[5] Before the commencement of the defence case, the respondent and Khiudin filed an application for a referral of a constitutional question to the High Court under s. 30 of the Courts of Judicature Act 1964.

Proceedings In The High Court

E **[6]** The question for determination by the High Court was:

Whether s. 122(1) of the Securities Industry Act 1983 (Act 280) violates articles 5(1) and 8(1) of the Federal Constitution.

[7] The question was answered in the affirmative by the High Court and F consequently the following orders were made:

a) that s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) of the Act completely abrogates the fundamental right of an accused person to be presumed innocent until proven guilty. As a result, s. 122(1) of the Act, therefore, violates articles 5(1) and 8(1) G of the Federal Constitution;

b) that s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) completely abrogates the fundamental right that a criminal charge must be proved by the prosecution against the accused H beyond reasonable doubt. As a result, s. 122(1) of the Act therefore violates articles 5(1) and 8(1) of the Federal Constitution;

c) that the arbitrary and indiscriminate use of s. 122(1) of the Act in this case is in violation of the fundamental rights of both accused guaranteed under articles 5(1) and 8(1) of the Federal Constitution I and must be struck down as unconstitutional;

d) that s. 122(1) of the Act violates the doctrine of separation of powers as enshrined in the Federal Constitution and is unconstitutional and void;

e) that the continued prosecution of both accused under the alternative charge after his acquittal on the principal charge is unconstitutional because it is being done in violation of article 7(2) of the Federal Constitution;

f) that both accused be hereby acquitted and discharged on the alternative charge; and

g) that the declaration of this court that s 122(1) of the Act is unconstitutional and therefore void, takes effect prospectively from the date of this judgment in order not to render invalid the prosecutions which have been instituted by the Public Prosecutor in other cases under s 122(1) of the Act.

[8] Essentially, the learned High Court Judge found that the right of an accused person to be presumed innocent until proven guilty and the right of an accused person to have a charge proven against him beyond reasonable doubt are fundamental rights enshrined in art. 5(1) of the Federal Constitution. Further, the High Court judge found that the deeming provision in s. 122(1) of the SIA strikes at the heart of art. 8(1) of the Federal Constitution for the reason that the public prosecutor had discriminated against the respondent and Khiudin by charging them but not the other directors in the company.

[9] Her Ladyship relied on a string of authorities on the rules of interpretation of the Federal Constitution which laid down the principle that the Federal Constitution must be given the broad and generous interpretation and not the narrow and pedantic sense and that full measure must be given to the fundamental rights.

[10] Dissatisfied with the order of the High Court, the public prosecutor appealed to this Court.

The Appeal

[11] The thrust of the appeal relates to the following aspects of the findings of the High Court Judge:

(i) section 122(1) was in violation of the art. 5(1) as it had taken away the presumption of innocence of an accused person.

(ii) section 122(1) was in violation of art. 8(1) as only the two accused persons were charged although there were other directors for Transmile Group Berhad.

(iii) section 122(1) violates the doctrine of separation of powers.

(iv) calling the respondent and Khiudin to enter defence on the alternative charge was in breach of the rule against double jeopardy.

Our Findings

Whether s. 122(1) Violates art. 5(1) Of The Federal Constitution

[12] Applying the principles of interpretation of the Federal Constitution as laid down in the cases referred to by the learned High Court Judge and repeated by learned counsel for the respondent (which we find no necessity to reproduce), we accept that the right of an accused person, for instance, to be presumed innocent until proven guilty according to law, the right to be represented by a counsel and the right to state his case, though not expressly provided for as part of the fundamental rights under the Federal Constitution, are rights encapsulated in a doctrine integral to our criminal justice system.

[13] Those rights, in our view are fundamental to an accused person in the sense that a breach may result in an accused person being deprived procedurally and substantively of a fair trial which in consequence, may result in a miscarriage of justice to the accused person which may in turn vitiate the trial or the conviction (see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301).

[14] Having said that, we bear in mind that there is a strong presumption in favour of constitutionality of an Act of Parliament or an impugned section with the burden of proof on whoever who alleges otherwise (see *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72; *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566).

[15] We also bear in mind that there is a distinction between a provision of the Federal Constitution and a doctrine. The significance of the distinction lies in the judgment of the Federal Court in *Public Prosecutor v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1 where Abdul Hamid Mohamad PCA (as he then was) said:

> [17] ... no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine.

[16] We now proceed to consider whether s. 122(1) of the SIA has clearly transgressed art. 5 of the Federal Constitution.

[17] To begin with, it must be noted that the fundamental rights enshrined under the Federal Constitution are not absolute. Although the principle is that the Federal Constitution must be given a broad and generous interpretation, it remains that, respect must be paid to the language used (see *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72).

[18] Having regard to the language used, art. 5 of the Federal Constitution clearly allows for the deprivation of the fundamental rights in accordance with law. As decided by the Federal Court in *Bird Dominic Jude v. Public Prosecutor* [2014] 4 CLJ 133; [2014] 3 MLJ 745:

> As regards the appellant's contention on the unconstitutionality of s. 56A of the CJA which allows the prosecution to effect his arrest and subsequent detention after his acquittal by the High Court and thereby violating his constitutional rights as guaranteed by arts 5(1) and 8(1) of the FC, with respect we could not agree with such a contention. On this issue the question is whether there is a specific law authorising such deprivation of the applicant personal liberties ...

[19] Hence, even if one were to accept that the presumption of innocence until proven guilty is a fundamental liberty enshrined under art. 5, art.5 itself allows for the deprivation of that fundamental liberty if the law so provides and in the instant appeal, s. 122(1) is the law depriving the respondent of the presumption of innocence.

[20] Section 122(1) of the SIA provides that "... the director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he can prove that the offence was committed without his consent or connivance." It is a deeming provision and its effect, in our view, is no different from the statutory presumptions found in several other laws enforced in this country.

[21] Various authorities were cited from foreign jurisdictions but without going far, the concept of statutory presumptions had been dealt with by our own courts. Buhagiar J in *Saminathan & Ors v. PP* [1955] 1 LNS 138; [1955] 21 MLJ 121 at pp. 124-125 had stated that:

> ... By various statutes some matter is presumed "unless the contrary is proved" and the onus of proving this matter is cast on the accused. Common examples of such presumptions are to be found in section 105 of the Evidence Ordinance, 1950, section 11 of the Common Gaming Houses Ordinance, 1953, section 5 of the Prevention of Corruption Ordinance, 1950, section 115 and 131(2) of the Customs Ordinance, 1952. Objection has been expressed to this type of legislation because, it is stated, it reverses the traditional principle and deems the party to be guilty until he proves his innocence.
>
> It seems to me, however, that these statutory presumptions are really nothing more than an extension of the provisions of section 106 of the Evidence Ordinance, 1950 which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[22] We respectfully adopt the above and the following judgment of Lord Diplock in the case of *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 at p. 71:

> In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.

[23] The use of presumption had also been clarified by the Supreme Court in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169 at p. 315 (CLJ); p. 171 (MLJ) as follows:

> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[24] The learned High Court judge found that the effect of s. 122(1) of the SIA is that when a company commits a s. 122B(a)(bb) offence, a director or an officer of the company is automatically deemed to have committed the offence. In this regard, we are of the view that the words "deemed to have committed the offence" do not make the respondent automatically guilty. The prosecution still has the burden to prove that the company had furnished a misleading statement and has committed an offence, before resort can be had against the directors under s. 122(1).

[25] Further, the respondent is not without any defence. The respondent may be absolved of liability under s. 122(1) if he could show that the offence was committed by the company without his consent or connivance and that he had exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

[26] It is thus our judgment that s. 122 (1), which is concerned with the rule of evidence where it shifts the burden on the respondent under s. 106 of the Evidence Act 1950 to show that the offence was committed by the company without the respondent's consent or connivance, has not transgressed art. 5. The respondent's consent or connivance or whether he had exercised such diligence to prevent the commission of the offence by the company is within his own knowledge.

Whether s. 122(1) Violates art. 8(1) Of The Federal Constitution

[27] Article 8 states that all persons are equal before the law and entitled to the equal protection of the law. The learned High Court Judge ruled that the respondent and Khiudin had been discriminated against as they were not given equal treatment as compared to the other directors of the company who were not charged.

[28] We disagreed with the learned High Court Judge. In our judgment, the answer to this issue lies in art. 145(3) of the Federal Constitution which provides that the discretion to charge vests in the Attorney General. Article 145(3) reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

[29] The Federal Court in *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 had discussed the powers of the Attorney General under art. 145(3) where Suffian LP had stated at p. 70 that:

> The language of this provision is very wide, for it includes the word "discretion" which means liberty of deciding as one thinks fit. In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to article 8. Rather, in my view, the contrary: article 8 it is that must be read subject to article 145(3).

[30] The learned Lord President had also considered the following example at p. 70:

> A person thought to be in unlawful possession of firearms may be charged under the Arms Act (Act 21 of 1960), for which the maximum penalty is seven years, or under the Firearms (Increased Penalties) Act (Act 37), for which the maximum penalty is 14 years, or under section 57 ISA, for which the penalty is death. It is argued that if three persons (say A, B and

A C) are thought to be in unlawful possession of firearms, to give the Attorney-General power to charge A under the first Act, B under the second and C under the third, would be in breach of article 8 of the constitution which guarantees equality before the law ...

... I am of the opinion that he may discriminate without contravening article 8.

B

[31] Guided by the above authority, we similarly find that the charge under s. 122(1) against the respondent and Khiudin but not the other directors, does not violate art. 8 of the Federal Constitution. And we do not find that s. 122(1) of the SIA contravenes art. 8 of the Federal Constitution in any way.

C

Whether s. 122(1) Violates The Doctrine Of Separation Of Powers

[32] On this issue, it was the finding of the learned trial judge that:

... the Federal Legislature, in enacting s. 122(1) of the Act, has usurped the judicial powers of the court by deeming that a director, chief executive officer or an representative of the body corporate has committed an offence where an offence has been committed by the body corporate. This is because it is trite constitutional law that only the courts can make a finding that a person has committed an offence.

D

E **[33]** In *Kok Wah Kuan v. PP* [2007] 4 CLJ 454; [2008] 1 MLJ 1, the Court of Appeal had ruled that s. 97(2) of the Child Act 2001 (which provides that Yang Di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri, as the case may be, may detain a convicted child at their pleasure) was unconstitutional. The Court of Appeal held that the doctrine of separation of powers is an integral part of the Constitution and that the judicial power of the Federation vests in the courts. And by consigning to the executive, the judicial power to determine the measure of the sentence to be served by the convicted child, s. 97(2) contravenes the doctrine of separation of powers in the Constitution.

F

G **[34]** On appeal, the Federal Court upheld the constitutionality of s. 97(2). Abdul Hamid Mohamad PCA (as he then was) said:

[17] ... Our constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision in the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy.

H

I

[35] We are bound by the judgment of the Federal Court. Thus we need say no more except that the issue of violation of the doctrine of separation of powers cannot be sustained.

Whether The Calling Of Defence On Alternative Charge Amounts To Double Jeopardy

[36] To recapitulate, the respondent and Khiudin were acquitted and discharged on the principal charge under s. 86 but were called to enter defence on the alternative charge under s. 122B(a)(bb) of the SIA. For the reasons that follow, it is our judgment that to call for defence on the alternative charge does not amount to double jeopardy.

[37] The rule against double jeopardy is found in art. 7(2) of the Federal Constitution which reads:

> (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

[38] The key words in art. 7(2) are "has been acquitted or convicted"; "shall not be tried again" and "for the same offence".

[39] In the instant appeal, the respondent and Khiudin had not been acquitted or convicted of the alternative charge, hence it could not be said that they are tried again for the alternative charge. As to whether the principal charge and the alternative charge are of the same offence, guidance is found in the case of *Jamali bin Adnan v. PP* [1985] 2 CLJ 415; [1985] CLJ (Rep) 167 where George Seah SCJ said at p. 172:

> The phrase "same offence" is used in Article 7(2) of the Federal Constitution, in s. 59 of the Interpretation Act 1967 and in s. 302(i) of the CPC. In *R v. Kupferberg* [1918] 13 Cr AR 166 at p. 168, A.T. Lawrence J said that:
>
> > the offence of which the accused has been acquitted and that with which he is charged must be the same in the sense that each must have the same essential ingredients ...
>
> This case was cited by Lord Morris in the Connelly case (supra) at p. 1324. In the Indian Supreme Court the expression "same offence" has been interpreted to mean "an offence whose ingredients are the same" (see *State of Bombay v. S.L. Apte* [1961] AIR SC 578 and *Manipur Administration v. Bira Singh* [1965] AIR SC 87). We agree and accept this construction by the Indian Supreme Court and would adopt it in construing the phrase "same offence" in the administration of criminal justice in (t)his country.

[40] Applying the above principle to the present appeal, we find that the principal charge and the alternative charge are not the same offence as the ingredients are different. In particular, while s. 86 relates to making a statement which induces the purchase of securities of Transmile Group

Berhad by other persons, no such ingredient is present in s. 122B(a)(bb). Section 122B(a)(bb) relates to furnishing a misleading statement to the stock exchange. The ingredient for the offence under the two sections is clearly distinct. And we note that the dates for the principal charge and the alternative charge are also different.

Conclusion

[41] Having regard to all the above, we are unanimous in our view that the learned High Court judge has erred in making the declaration that s. 122(1) of the SIA is unconstitutional. We therefore allow the appeal by the prosecution and we set aside the orders of the High Court. The case is remitted to the Sessions Court for the trial to proceed with the defence case.